IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA BERMUDEZ,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 99-4091
	:	
v.	:	
	:	
MUHLENBERG HOSPITAL CENTER,	:	
	:	
Defendant.	:	

M E M O R A N D U M

BUCKWALTER, J. October 18, 2000

Presently before the Court is defendant Muhlenberg Hospital Center's ("MHC" or "Defendant") Motion for Summary Judgment and plaintiff Linda Bermudez's ("Plaintiff") Response thereto. Plaintiff brought this action against Defendant alleging her employment was terminated because she was pregnant in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

On summary judgment, the Court draws all inferences from the facts provided in a light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Defendant hired Plaintiff on December 5, 1997 as a nursing assistant under the direction of Virginia Stover, the Director of MHC's Critical Care Department. Like all

employees, Plaintiff was placed on a 180-day new employee probation. During this probationary period, Plaintiff was absent from work, according to Plaintiff, eleven times. After the ninth absence in April, 1998, Stover gave Plaintiff a "last chance warning," indicating that no more absences would be tolerated. Plaintiff was absent two more times in May, 1998 and subsequently discharged in accordance with the warning on May 19, 1998.

Defendant was cognizant of Plaintiff's pregnancy during this time. Plaintiff notified Defendant she was pregnant in February, 1998 and, in April, 1998, provided Defendant with a doctor's note explaining that one of her absences was due to pregnancy related health conditions.

During an overlapping time period, Defendant hired another nursing assistant, Tamika Calderon. Calderon was hired in March, 1998 and also was placed on the 180-day new employee probation under Stover's supervision. According to Plaintiff, Calderon was absent four times early in her tenure and was absent or late an additional six times during the probationary period. Plaintiff further alleges that Calderon failed to give prior notification to the Defendant on two of the earliest four occasions. Stover did not give Calderon a "last chance warning" and Calderon never violated any such warning.

II. DISCUSSION

A. Summary Judgment Standard

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." Anderson v.

Liberty Lobby Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See Diebold, 369 U.S. at 655. The nonmoving party, however, cannot "rely merely upon bare assertions, conclusory allegations or suspicions" to support its claim. Fireman's Ins. Co. v. DeFresne, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the non-moving party's position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, "[t]he moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

B. Plaintiff's Pregnancy Discrimination Claim

Title VII prohibits employment discrimination based on an individual employee's sex. 42 U.S.C. § 2000e-2(a). The Pregnancy Discrimination Act ("PDA"), a 1978 amendment to Title VII, states:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k).

There is employment discrimination whenever an employee's pregnancy is a motivating factor for the employer's adverse employment decision. 42 U.S.C. § 2000e-2(m).

A plaintiff in an employment discrimination action may show discrimination either through direct evidence, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985), or through the analytical framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).[1] Here, Plaintiff offers no direct evidence of discrimination, so the Court must analyze this case under the McDonnell Douglas framework.[2]

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1. The Supreme Court designed this distinct method of proof in employment discrimination cases using presumptions and shifting burdens because it recognized that direct evidence of an employer's motivation will often be unavailable or difficult to acquire. See Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'") (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979).

2. The only evidence Plaintiff offered as direct evidence was language from Stover's deposition, which, when taken in context, was not evidence of discrimination. It was, as this Court believes, Stover's interpretation of Hospital guidelines which in themselves also are not discriminatory.

The framework consists of a three step analysis. See Simpson v. Kay Jewelers, 142 F.3d 639, 644 n.5 (3d Cir. 1998), citing McDonnell Douglas, 411 U.S. at 802-04. Each step is set forth below in turn. First, a plaintiff has the burden of proving a four prong prima facie case of discrimination. See Simpson, 142 F.3d at 644 n.5; see also Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). This prima facie case, as pointed out by the Eleventh Circuit, has been modified as necessary to facilitate analysis in a wide range of discrimination cases. See Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1314 (11th Cir. 1994). Here, the most appropriate four elements for the Plaintiff to show are: 1) Plaintiff is a member of a group protected by Title VII; 2) Plaintiff was qualified for her position; 3) Plaintiff suffered an adverse effect on her employment; and 4) Plaintiff suffered from differential application of work or disciplinary rules.[3] See Armstrong, 33 F.3d at 1314, citing Armstrong v. Flowers Hosp., Inc., 812 F. Supp. 1183, 1189 (M.D. Ala. 1993).[4]

Second, if plaintiffs establish a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the challenged action. McDonnell Douglas, 411 U.S. at 802.

Finally, if the defendant carries its burden, the burden shifts back to the plaintiff to demonstrate that the legitimate reason offered by the defendant was not the actual reason, but a pretext for discrimination. See Simpson, 142 F.3d at 644 n.5; see also Jackson, 826 F.2d at 232. More specifically, when in the context of summary judgment, the plaintiff must

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3. Here, the fourth prong reflects Plaintiff's claim that Defendant enforced rules regarding absences in a discriminatory manner. (Plaintiff's Affidavit ¶ 19-20.)

4. The Third Circuit has not set forth a McDonnell Douglas four part prima facie analysis tailored to a situation involving both alleged pregnancy discrimination and alleged differential application of work or disciplinary rules.

> point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.

Fuentes, 32 F.3d at 764. If a plaintiff fails at either the prima facie stage or the pretext stage, summary judgment will be granted in favor of the defendant.

C. Plaintiff Fails to Meet Her Burdens

The Court does not believe Plaintiff has met her burden at both the prima facie stage and, even if we assume *arguendo* that the prima facie case is met, the final pretext stage. On the other hand, the Court does believe Defendant has met its burden of articulating a legitimate, nondiscriminatory reason for discharging Plaintiff.

1. The Prima Facie Stage

There is no dispute that Plaintiff meets the first three elements of the prima facie case, but the Court believes Plaintiff fails to meet the fourth element. The fourth element requires Plaintiff to show she suffered from differential application of work or disciplinary rules. See Armstrong, 33 F.3d at 1314. The only facts Plaintiff relies upon to show differential treatment center around one non-pregnant co-worker, Calderon, who Plaintiff claims had an equally poor attendance record and whom Defendant did not discipline as severely as Plaintiff. The Court disagrees with Plaintiff's assessment that Calderon's record is equal to Plaintiff's record. Plainly stated, Plaintiff had at least two more absences than Calderon during her 180-day probation period and Plaintiff violated a "last chance warning" unlike Calderon who never received such a warning, let alone violated one. From these facts, which the Court takes directly

from Plaintiff's assertions, Plaintiff is unable to claim that she and Calderon are comparable and that she, therefore, suffered from differential application of work or disciplinary rules.

Assuming, *arguendo*, these absence records are similar enough to satisfy the fourth element, the Court is instructed to proceed to the second part of the McDonnell Douglas framework which shifts the burden of production to Defendant. McDonnell Douglas, 411 U.S. at 802. The Court believes, and Plaintiff admits, Defendant meets its burden of articulating some legitimate, nondiscriminatory reason for Plaintiff's termination by citing Plaintiff's excessive absenteeism. (Plaintiff's Response at 14-15.) The Court, therefore, proceeds to the third and final stage of the McDonnell Douglas analysis.

2. The Pretext Stage

In this final stage, the burden shifts back to Plaintiff to demonstrate that the legitimate reason offered by the defendant was not the actual reason, but a pretext for discrimination. See Simpson, 142 F.3d at 644 n.5; see also Jackson, 826 F.2d at 232. As explained *supra*, when in the context of summary judgment, this means the plaintiff must present evidence "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes, 32 F.3d at 764. Again, the Court believes Plaintiff fails.

First, to discredit the employers stated reason for termination, Plaintiff must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for [the asserted]

non-discriminatory reasons." Fuentes, 32 F.3d at 765 (internal quotation omitted). This Court believes this is a substantial hurdle Plaintiff is unable to overcome. Plaintiff claims Defendant fabricated the twelfth and final absence on her record (Plaintiff's Affidavit ¶ 25) and also asserts Defendant intentionally failed to document all of Calderon's absences (Plaintiff's Affidavit ¶ 13). These claims, however, are supported only by assertions and allegations made in Plaintiff's own deposition and affidavit. The Court believes this evidence falls short of what is required of Plaintiff under the standards for summary judgment, and, therefore, does not believe Plaintiff successfully discredits Defendant's stated reason for terminating Plaintiff. See Fireman's Ins. Co. v. DeFresne, 676 F.2d 965, 969 (3d Cir. 1982) (explaining that a non-moving party cannot rely upon bare assertions, conclusory allegations or suspicions to support its claim).

The second manner by which Plaintiff may show pretext at this summary judgment stage is by presenting evidence that would enable a reasonable factfinder to believe that discrimination was more likely than not a motivating or determinative cause of Defendant's decision to discharge Plaintiff. See Fuentes, 32 F.3d at 764. This can be achieved by showing that Defendant previously had subjected Plaintiff to unlawful discriminatory treatment, that Defendant has discriminated against other pregnant employees or other protected categories of persons, or that Defendant treated other, similarly situated persons who were not pregnant more favorably than Plaintiff. See id. at 765. Here, Plaintiff tries to show discrimination was a factor in her termination by drawing a distinction between her treatment and that of Calderon, a non-pregnant person allegedly similarly situated. As explained *supra*, when discussing Plaintiff's prima facie case, the Court does not believe Plaintiff has shown Calderon is similarly situated,

and therefore, finds no reasonable factfinder would believe discrimination was more likely than not a motivating or determinative factor.

The Court finds helpful the Third Circuit's decision in Simpson v. Kay Jewelers, 142 F.3d 639 (3d Cir.1998), in which the Court explained discrimination may not be inferred anytime one person representing a non-protected group is treated more favorably than a person from a protected group, regardless of how many other non-protected people were treated equally or less favorably than the plaintiff. See Simpson, 142 F.3d at 646. Here, Plaintiff's only proffered example of unequal treatment is Calderon, who the Court believes was not similarly situated with Plaintiff. Even if Calderon and Plaintiff were similarly situated, Plaintiff only offers this one example of a non-protected person treated more favorably, and fails to show that others who received the treatment Plaintiff received were also pregnant or of another protected group. If the Court were to enable Plaintiff to rely on such limited evidence, it would have to ignore the Third Circuit's clear policy against tokenism articulated in Simpson.

III. CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment will be granted.

An appropriate order follows.

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v.	:	
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MUHLENBERG HOSPITAL CENTER,	:	
	:	
Defendant.	:	

O R D E R

AND NOW, this 18th day of October, 2000, upon consideration of defendant Muhlenberg Hospital Center's Motion for Summary Judgment and plaintiff Linda Bermudez's Response thereto, it is hereby **ORDERED** that Muhlenberg Hospital Center's motion is **GRANTED**. Judgment is entered in favor of defendant Muhlenberg Hospital Center and against plaintiff Linda Bermudez.

This case is marked **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.